Supreme Court, U.S.
FILED

97-268 AUG 11 1997

OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

JESSE EDWIN RICHBURG
Petitioner,

V.

UNITED STATES OF AMERICA
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Fred Ray Lybrand
Counsel of Record for
Petitioner Jesse Edwin Richburg
Post Office Box 758
Anniston, AL 36202
(205)236-8683

HIPP

QUESTIONS PRESENTED FOR REVIEW

1. For double jeopardy purposes, does each act of interstate commerce create a separate offense under 18 U.S.C. § 1958?

2. Is 18 U.S.C. § 371 a lesser included offense of 18 U.S.C.§ 1958?

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CITATIONS OF OPINIONS AND ORDERS BELOW

In District Court Docket Number CR-94-35-S, the United States District Court for the Middle District of Alabama, on October 30, 1995, entered an oral Order denying Richburg's Motion to Dismiss. On March 19, 1996, in District Court Docket Number CR-94-35-S, said Court entered a written Order denying Richburg's Motion for Judgement of Acquittal.

In its opinion dated February 7, 1997, in case no. 96-6328, the United States Court of Appeals for the Eleventh Circuit affirmed Richburg's conviction and sentence. U.S. v. Richburg, 108 F. 3rd 344 (11th Cir. 1997). In its opinion and ruling dated May 12, 1997, in case no. 96-6328, said Court denied Richburg's Petition for Rehearing.

BASIS FOR JURISDICTION

The convictions and sentences imposed by the District Court were affirmed by the United States Court of Appeals for the Eleventh Circuit on February 7, 1997. A timely petition for rehearing and suggestion of rehearing en banc was denied on May 12, 1997. Jurisdiction to review the judgement of the Court of Appeals by writ of certiorari is conferred on this Court by Title 28 U.S.C. § 1254(1).

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. UNITED STATES CONSTITUTION, FIFTH AMENDMENT: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. TITLE 18 U.S.C. § 1958: (a) Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use mail or any facility in interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, shall be fined under this title or imprisoned for not more than ten years, or both; and if personal injury results, shall be punished by death or life imprisonment, or shall be fined not more than $250,000, or both.

(b) As used in this section and section 1959--

(1) "anything of pecuniary value" means anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage;

(2) "facility of interstate commerce" included means of transportation and communication; and

(3) "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

3. TITLE 18 U.S.C. § 371: If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

4. TITLE 18 U.S.C. § 924(c)(1): Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted

in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machine gun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machine gun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of the law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

STATEMENT OF THE CASE

The Government, on January 19, 1994, brought a five-count indictment against Jesse Edwin Richburg. Count I was a conspiracy, 18 U.S.C. § 371, to commit murder-for-hire. Counts II, III, and IV were based upon violation of the murder-for-hire statute, 18 U.S.C. § 1958. Each § 1958 count covered a separate interstate journey made by the conspirators to kill J.W. Griffin. Count V was a violation of 18 U.S.C. § § 1958, 924 (c)(1), furnishing a firearm for use in a murder-for-hire.

Richburg's trial commenced on September 26, 1995, in the United States District Court, Middle District of Alabama, Southern Division. This Court had jurisdiction to hear this case pursuant to Title 18 U.S.C. § 3231. The Government offered evidence in an attempt to establish the following scenario. Richburg hired David Scott to kill J.W. Griffin. David Scott made three separate journeys from Oklawaha, Florida to Geneva, Alabama, to murder J.W. Griffin. David Scott hired James Linder to accompany him on the second and third journeys. During each of the three journeys, the State line between Florida and Alabama was crossed with the intent to find and kill J.W. Griffin. David Scott shot and killed J.W. Griffin during the third journey to Alabama. Richburg furnished the gun that David Scott used to kill J.W. Griffin.

The defense did not challenge either by witnesses or by argument that the murderers made the three interstate journeys to find and kill J.W. Griffin. The defense did challenge any alleged involvement by Richburg and instead offered evidence that a Bobby Price sent the murderers to Alabama.

On October 3, 1995, the trial ended when a jury returned a verdict of not guilty as to Count III of the indictment, one of three murder-for-hire § 1958 counts. The Court declared a mistrial as to the remaining counts.

Before a scheduled second trial, Richburg filed a motion to dismiss the case based on double jeopardy grounds. The Court denied Richburg's motion to dismiss in an oral Order entered before the second trial began.

The second trial began on October 30, 1995, and on November 3, 1995, a jury returned guilty verdicts on the same four counts on which the Court had declared a mistrial in the first trial.

On November 9, 1995, Richburg filed a motion for judgement of acquittal upon grounds that double jeopardy barred the second prosecution. During February 1996, both Richburg and the Government filed briefs with the Court to support their respective positions on the motion for judgement of acquittal. Their arguments centered upon whether or not the double jeopardy clause of the fifth amendment collaterally estopped the second trial.

On March 19, 1996, the Court denied Richburg's motion for judgement of acquittal, holding that collateral estoppel did not apply.

The Court, on April 4, 1996, gave Richburg two imprisonment-for-life sentences for the two U.S.C. § 1958 convictions. The court also sentenced him to imprisonment for 60 months each on the 18 U.S.C. § 371 and 18 U.S.C. § § 1958, 924(c)(1), convictions. Each 60 month sentence was to run consecutively with the other three sentences. For each of the § 1958 convictions, Richburg was fined $533,799.00 with restitution set at $3,500.00.

Richburg filed a timely notice of appeal with double jeopardy and collateral estoppel included in the grounds as the basis for his appeal. On February 7, 1997, and Eleventh Circuit Panel affirmed all of his convictions. The same Eleventh Circuit Panel on May 12, 1997, also denied a timely filed petition for rehearing and suggestion of rehearing en banc that contained only the double jeopardy and collateral estoppel grounds.

ARGUMENT

Twenty seven days after winning an acquittal on a charge of murder-for-hire, the Government again put Richburg on trial in the same court, on the same charge, involving the same conspirators, with the same victim. The only variable between the acquitted § 1958 count and the § 1958 counts that Richburg was convicted of, is the separate acts of interstate commerce. The Double Jeopardy Clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." United States Constitution, Fifth Amendment. The question or issue is, does each act of interstate commerce, in of itself, create a separate 18 U.S.C.A. § 1958 crime?

To decide if separate acts equal separate offenses under the same statute, this Court has said,

"The test is whether the individual acts are prohibited, or the course of action which they constitute. If the former, then each act is punishable separately ...If the latter, there can be but one penalty." Blockburger v. United States, 284 U.S. 299, 302, 52 S. Ct. 180, 76 L. Ed. 306, 308. The test when stated for this statute is, did Congress intend to punish those who engage in interstate commerce or those who enter into murder-for-hire schemes? The answer is obvious that the interstate and foreign commerce language is the jurisdictional device needed to empower federal investigation and prosecution of what had been a traditional

State Crime.

Most of the circuits are in harmony that the interstate nexus is merely a jurisdictional prerequisite, not an essential element of the crime under § 1958 and its predecessor statutes § § 1952A, 1952. U.S. v. Houlihan, 92 F. 3d 1271, 1292 (1st Cir. 1996), U.S. v. Winters, 33 F. 3d 720, 722 (6th Cir. 1994), U.S. v. Razo-Leora, 961 F. 2d 1140, 1148 (5th Cir. 1992), U.S. v. Edelman, 873 F. 2d 791, 794-795 (5th Cir. 1989).

However, the United States Courts of Appeals are not in harmony when it comes to the question of whether each act of interstate commerce creates a separate § 1958 offense. In U.S. v. Wynn, 987 F. 2d. 354 (6th Cir. 1993), the defendant was indicted, convicted and sentenced on five counts of violating 18 U.S.C. § 1958. Each count was based upon a separate interstate telephone call. Id. 355. The 6th Circuit vacated the defendant's sentence and remanded to the district court for resentencing upon the grounds that, "separate phone calls which relate to one plan to murder one individual constitute only one violation of 18 U.S.C. § 1958." Id. 359.

In contrast to this 6th Circuit decision, the 4th and 7th Circuits have joined the 11th Circuit in sanctioning multiple count § 1958 convictions, with the different counts based solely upon separate acts of interstate commerce. U.S. v. Morin, 80 F. 3d 124, 126 (4th Cir. 1997), U.S. v. King, 75 F. 3d 1217, 1219

(7th Cir. 1996), U.S. v. Higham, 98 F. 3d 285, 287 (7th Cir. 1996)

This Court has already condemned this practice of breaking one crime into small pieces, thereby giving the prosecution more shots at the accused in successive trials. In Brown v. Ohio, 432 U.S. 161, 169, 53 L Ed 2d 187, 196, 97 S. Ct. 2221 (1977), one offense resulted in successive trials and convictions on counts that differed only in the alleged times that separate incidents took place. This Court said,

"The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." Id.

The second issue or question is, did Richburg's § 1958 acquittal include as a lesser included offense the § 371 count? This Court has held that if offenses cannot survive the same-elements test, then they are the "same offense" for double jeopardy purposes. This test says that two offenses are the "same offense" unless each offense contains an element not contained in the other. U.S. v. Dixon, 509 U.S. ___, 125 L. Ed. 2d. 556, 568, 113 S. Ct. 2849, 2856.

Conviction under 18 U.S.C. § 371 requires proof of: (1) an agreement, (2) a combination of two or more persons, (3) an unlawful purpose, and (4) an overt act committed by one of the conspirators in furtherance of the conspiracy.

United States v. Sellaro, 514 F. 2d 114, 121 (8th Cir. 1973).

A § 1958 violation requires: (1) travel in interstate or foreign commerce, or use of any facility in interstate or foreign commerce, (2) with intent that a murder be committed, (3) as consideration for the receipt of or promise to pay anything of pecuniary value. U.S. v. Houlihan, 92 F. 3d 1271, 1292 (1st Cir. 1996), U.S. v. Ritter, 989 F. 2d 318 (9th Cir. 1993).

When applying the same-elements test to determine if one offense is included in a second offense, this Court has said, "As is invariably true of a greater and lesser included offense, the lesser offense...requires no proof beyond that which is required for conviction of the greater... The greater offense is therefore by definition the 'same' for purposes of double jeopardy as any lesser offense included in it." Brown v. Ohio, 432 U.S. 161, 168, 53 L. Ed. 2d 187, 195-196, 97 S. Ct. 2221 (1977).

The § 1958 scheme that the jury acquitted Richburg of, alleged that he made an agreement (an agreement) with David Scott (a combination of two or more persons) for Scott to murder (an unlawful purpose) J.W. Griffin and Scott traveled (an overt act committed by one of the conspirators in furtherance of the conspiracy) in interstate commerce with intent to commit the murder. To prove the murder-for-hire scheme, one must invariably prove the § 371 conspiracy. The § 1958 statute itself

makes it plain that the murder does not have to be effected for a violation to occur, all needed is a conspiracy to do so, "...or who conspires to do so ..." Title 18 U.S.C. § 1958.

Argument Conclusion

The relationship between § § 371 and 1958 is an important question of federal law that this Court should decide. Defendants in the 8th, 9th, 10th and now 11th circuits have been prosecuted for the same single agreement under both statutes. U.S. v. Basile, 109 F. 3d 1304 (8th Cir. 1997), U.S. v. Ritter, 989 F. 2d 318 (9th Cir. 1993), U.S. v. McCullah, 76 F. 3d 1087 (10th Cir. 1996). In other words, the Government put these defendants on trial for a conspiracy to form a conspiracy, which means they were put in jeopardy twice for the same offense.

The 11th Circuit's sanction of the District Court's refusal to dismiss upon double jeopardy grounds the charges and convictions against Richburg prior and subsequent to his second trial is error. This decision conflicts with interpretation of the Double Jeopardy Clause by other circuits and this Honorable Court.

If each act of interstate or foreign commerce creates a new § 1958 crime, the Double Jeopardy Clause is indeed a fragile guarantee. In this age of intercontinental travel and instant worldwide communications, the government could use this tactic to bring a near endless stream of successive § 1958

prosecutions that stem from one alleged plot to kill one person. If this is the law, then no man can stand against a government determined to prosecute to the last jot and tittle of the law. Constitutional guarantees would be meaningless.

For the reasons set herein, Petitioner respectfully urges that this Court grant the Petition for Certiorari to the United States Court of Appeals for the Eleventh Circuit and rule on this case.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Petition for a Writ of Certiorari upon:

The Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, DC 20530-0001

by depositing the same in the United States Mail with adequate postage affixed thereto to ensure the delivery of the same.

This the _____ day of August, 1997.

Fred Ray Lybrand
Counsel of Record for
Petitioner Jesse Edwin Richburg
Post Office Box 758
Anniston, AL 36202
(205)236-8683

APPENDIX

1. Copy of opinion, U.S. Court of Appeals for the 11th Circuit, Case No. 96-6328, UNITED STATES OF AMERICA versus JESSE EDWIN RICHBURG, a.k.a. Shot, issued February 7, 1997.

2. Copy of Order of U.S. Court of Appeals for the 11th Circuit, denying the Petition for Rehearing filed by the Appellant, Jesse Edwin Richburg, dated may 12, 1997.

3. Copy of Indictment styled, UNITED STATES OF AMERICA v. JESSE EDWIN RICHBURG, a/k/a/ SHOT, filed January 19, 1994.

4. Copy of Motion to Dismiss filed by Richburg in District Court on October 30, 1995, before start of second trial.

5. Second trial transcripts, oral Order by District Court denying Richburg's Motion to Dismiss.

6. Copy of Motion by Richburg for Judgement of Acquittal entered in District Court on November 9, 1995.

7. Copy of District Court Order, filed on March 19, 1996, denying Richburg's Motion for Judgement of Acquittal.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FEB - 7 1997
MIGUEL J. CORTEZ
CLERK

No. 96-6328
Non-Argument Calendar

D.C. Docket No. CR-94-35-S

UNITED STATES OF AMERICA

Plaintiff-Appellee,

versus

JESSE EDWIN RICHBURG, a.k.a. Shot

Defendant-Appellant.

Appeal from the United States District Court

for the Middle District of Alabama

(February 7, 1997)

Before BIRCH and BLACK, Circuit Judges, and

KRAVITCH*, Senior Circuit Judge.

PER CURIAM:

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*Judge Kravitch was in regular active service when this matter was originally submitted but has taken senior status effective January 1, 1997.

Appellant Jesse Edwin Richburg was convicted after a jury trial of:

(1) conspiracy to commit murder for hire in violation of 18 U.S.C. § 371; (2) causing another person to travel in interstate commerce on June 8, 1993, to commit murder for hire in violation of 18 U.S.C. § 1958; (3) causing another person to travel in interstate commerce on July 10, 1993, to commit murder for hire in violation of 18 U.S.C. § 1958; and (4) aiding and abetting another person to carry a firearm in commission of a crime of violence in violation of 18 U.S.C. § 924(c)(1)-(2). He raises the following issues on appeal: (1) whether the district court erred in admitting evidence of other crimes pursuant to Rule 404(b); (2) whether the district court erred in denying Appellant's motion to dismiss on double jeopardy grounds; and (3) whether the district court erred in denying Appellant's motion to dismiss on collateral estoppel grounds.

After a review of the record and consideration of Appellant's arguments, we find the district court did not err.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-6328

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAY 12 1997
MIGUEL J. CORTEZ
CLERK

UNITED STATES OF AMERICA

Plaintiff-Appellant,

versus

JESSE EDWIN RICHBURG, a.k.a. Shot

Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Alabama

ON PETITION(S) FOR REHEARING AND

SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11th Cir., 19___, _____F.2d_____)

Before: BIRCH and BLACK, Circuit Judges, and KRAVITCH, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

S

UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

FILED
Jan 19 1994
THOMAS C. CAVER, CL
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DEPUTY CLERK

UNITED STATES OF AMERICA	CR.NO. 94-35-S
v.	[18 USC 371;
JESSE EDWIN RICHBURG, a/k/a SHOT	18 USC 1958;
	18 USC 924(C)(1)]
	INDICTMENT

The Grand Jury charges that:

COUNT I

Between on or about June 1, 1993, and on or about July 30, 1993, in the Middle District of Alabama, and elsewhere,

JESSE EDWIN RICHBURG,
a/k/a SHOT,

the defendant, knowingly and willfully combined, conspired, confederated and agreed, together with William David Scott and with other persons known and unknown to the grand jury, to commit offenses against the United States of America, that is, to violate Title 18, United States Code, Section 1958, by travelling in or causing another to travel in interstate or foreign commerce, with the intent that a murder be committed in violation of the laws of any State or the United State, as consideration for the receipt of, or as consideration for a promise or agreement to pay anything of pecuniary value.

ATTEST A True Copy Certified To 5/10/1996
Thomas C. Caver
Clerk, U.S. District Court, Middle District of Alabama
S

OVERT ACTS

In furtherance of the said conspiracy and to accomplish the objects thereof, the conspirators committed one or more of the following overt acts within the Middle District of Alabama:

1. On or about June 8, 1993, William David Scott traveled from near Ocala, Florida to Geneva, Alabama.

2. On or about June 28, 1993, William David Scott and James Ellis Linder travelled from near Ocala, Florida to Geneva, Alabama.

3. On or about July 9, 1993, William David Scott and James Ellis Linder travelled from near Ocala, Florida to Geneva, Alabama

4. On or about July 10, 1993, William David Scott and James Ellis Linder traveled from Geneva, Alabama to Panama City, Florida.

5. On or about July 10, 1993, in Geneva, Alabama, William David Scott shot James W. Griffin.

6. On or about July 10, 1993, in Geneva, Alabama, William David Scott stole a motor vehicle which he drove to Panama City, Florida and abandoned.

7. The grand jury further realleges Counts Two through Five of the Indictment as though fully set forth herein, in furtherance of the conspiracy.

All in violation of Title 18, United States Code, Section 371.

COUNT II

On or about June 8, 1993, in the Middle District of Alabama and elsewhere,

JESSE EDWIN RICHBURG,
a/k/a SHOT,

the defendant, did knowingly and willfully cause William David Scott to travel in interstate commerce from near Ocala, in the State of Florida to Geneva, Alabama, with the intent that William David Scott murder James W. Griffin, in violation of the laws of the State of Alabama and the United States, as consideration for a promise and agreement by JESSE EDWIN RICHBURG, a/k/a "SHOT", to pay William David Scott a thing of pecuniary value; all in violation of Title 18, United States Code, Section 1958.

COUNT III

On or about June 22, 1993, in the Middle District of Alabama and elsewhere,

JESSE EDWIN RICHBURG,
a/k/a SHOT,

the defendant, did knowingly and willfully cause William David Scott and James Ellis Linder to travel in interstate commerce from near Ocala, Florida to Geneva, Alabama, with the intent that William David Scott murder James W. Griffin, in violation of the laws of the State of Alabama and the United States, as consideration for a promise and agreement by JESSE EDWIN RICHBURG, a/k/a "SHOT", to pay William David Scott a thing of pecuniary value; all in violation of Title 18, United States Code, Section 1958.

COUNT IV

On or about July 10, 1993, in the Middle District of Alabama and elsewhere,

JESSE EDWIN RICHBURG,
a/k/a SHOT,

the defendant, did knowingly and willfully cause William David Scott and James Ellis Linder to travel in interstate commerce from near Ocala, Florida to Geneva, Alabama, with the intent that William David Scott murder James W. Griffin, in violation of the laws of the State of Alabama and the United States, as consideration for a promise and agreement by JESSE EDWIN RICHBURG, a/k/a "SHOT", to pay William David Scott a thing of pecuniary value; all in violation of Title 18, United States Code, Section 1958.

COUNT V

On or about July 10, 1993, in Geneva, in the Middle District of Alabama, and elsewhere,

JESSE EDWIN RICHBURG,
a/k/a SHOT,

the defendant, did aid, abet, counsel, and advise William David Scot to carry a firearm during and in relation to the commission of a crime of violence, that is, murder for hire, in violation of Title 18, United States Code, Section 1958, a crime prosecutable in a court of the United States, all in violation of Title 18, United States Code, Sections 924(c)(1) and 2.

A TRUE BILL:

s _____
JAMES ELDON WILSON
United States Attorney

s _____
Foreperson

s _____
CHARLES F. TESCHNER
Assistant United States Attorney

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

FILED
OCT 30 1995
CLERK
U.S. DIST. COURT
MIDDLE DIST. OF
CLERK

UNITED STATES OF AMERICA, Plaintiff, v. JESSE EDWIN RICHBURG, Defendant.	)	CASE NO. CR-94-35-S

MOTION TO DISMISS

COMES NOW the Defendant in the above-styled case and asks this Honorable Court to dismiss the above styled case on the basis of Double Jeopardy on the following grounds:

The defendant was charged and tried as a principal to the death of J.W. Griffin. Count I charges a conspiracy to effect the death of Mr. Griffin. Counts II, III & IV charge the Defendant with causing others to travel in interstate commerce to kill J.W. Griffin. Count V charges the Defendant with providing a gun to be transported in Interstate Commerce that was used for the murder.

The Government's theory was that the defendant procured counseled advised, etc. others, to travel to Alabama and kill J.W. Griffin with a pistol provided by the Defendant. The defense did not suggest that any of the trips or the murder did not occur. Nor did it question that a firearm was provided or used.

The jury acquitted the Defendant of Count III, the second trip. This acquittal presumes that this evidence was insufficient to prove that the Defendant was a principal to that act. Since the evidence was insufficient to prove that the Defendant was the principal to that trip, it was likewise insufficient to show that he was the principal to any other act alleged.

Further prosecution on Counts I, II, IV & V are barred by the Double Jeopardy Clause and Amendment 5 to the Constitution of the United State of America.

RESPECTFULLY SUBMITTED this the 30th day of October, 1995.

S _____
CLIFFORD L. DAVIS

S _____
RONALD W. WISE

OF COUNSEL:
RONALD W. WISE, ESQ.
2000 Interstate Park Drive
Suite 201
Montgomery, AL 36109
334/270-1300

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing document on Hon. Charlie Teschner, Assistant U.S. Attorney, One Court Square, Suite 201, Montgomery, Alabama, a copy of same in open Court on this the 30th day of October 1995.

S _____
OF COUNSEL

WHEREUPON, THE FOLLOWING 1ST DAY OF THE 2ND JURY TRIAL PROCEEDINGS WERE HEARD ON OCTOBER 30TH, 1995 BEFORE THE HON. MYRON H. THOMPSON AT THE UNITED STATES DISTRICT COURT IN MONTGOMERY, ALABAMA:

PRELIMINARY DISCUSSION & MOTIONS IN OPEN COURT (THE JURY IS NOT PRESENT):

THE COURT: Counsel, I have this motion to dismiss in Richburg. I'll hear from the Government.

MR. TESCHNER: Your Honor, the motion filed by the defendant stated that there is a double jeopardy claim. It is without merit. The United States' position is that we have charged a conspiracy. With that conspiracy there had been charged four substantive counts, and now there are three substantive counts. There was an acquittal on one substantive count.

The United States relies on United States v. Corley, an Eleventh Circuit case, 824 F.2d 931, 1987. Clearly on point. I have a copy for the Court, your Honor.

In that case there was an acquittal on a substantive count, a conspiracy charge remaining. The Eleventh Circuit held it proper to go forward on the conspiracy count, even though the substantive count had been acquitted by the jury.

THE COURT: Mr. Wise, Mr. Davis, anything

else?

MR. DAVIS: Judge, only that in this case the unique facts of the trial were that Mr. Richburg's place from front to rear was at that he was purely in a principal position. That was the theory of the Government's case. He caused, procured, he aided, he directed, and he either aided and directed all of them or none of them. And it's our position that by an acquittal in one and failure to reach a verdict on the other counts, that it constituted, in effect, an acquittal on all counts.

THE COURT: The motion is denied.

MR. WISE: Your Honor, if I may bring something to the Court's attention?

THE COURT: Yes.

MR. WISE: The first time we tried this case, we had a witness subpoenaed by the name of Kay Klapper, K--L--A--P--P--E--R. Miss Klapper was subpoenaed, and I believe she was to cash a witness fee check that Mr. Davis sent with the subpoena. She did not show up for trial the first time, nor did she contact my office to make arrangements to be placed on call, which is customarily what I do with a witness.

It is turned out that we did not need to call her last time; however, we do need her this time. We

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

FILED
NOV 9 1995
CLERK
U.S. DISTRICT COURT
MIDDLE DIST. OF ALA.
MONTGOMERY, ALA.

UNITED STATES OF AMERICA, Plaintiff, v. JESSE EDWIN RICHBURG, Defendant.	)	CASE NO. CR-94-35-S

MOTION FOR JUDGEMENT OF ACQUITTAL

Comes now the Defendant in the above-styled case and hereby moves the Court to enter a Judgement of Acquittal as to all counts pursuant to Rule 29 of the Federal Rules of Criminal Procedure on the grounds stated at the close of the Government's case as well as the close of the Defendant's case and hereby renews said grounds for this motion. Further, the Defendant renews his motion to dismiss which was filed prior to the time of trial on the grounds set out therein.

RESPECTFULLY SUBMITTED this the 9th day of November, 1995.

s

RONALD W. WISE
Attorney for Defendant

OF COUNSEL:
RONALD W. WISE, ESQ.
2000 Interstate Park Drive
Suite 201
Montgomery, AL 36109
334/270-1300

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing document on Hon. Charlie Teschner, Assistant U.S. Attorney, One Court Square, Suite 201, Montgomery, Alabama, by placing a copy of same in the United States Mail, postage pre-paid and properly addressed on this the 9th day of November 1995.

S

OF COUNSEL

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

FILED
MAR 19 1996
CLERK
U.S. DISTRICT COURT
MIDDLE DIST. OF ALA.
MONTGOMERY, ALA.

UNITED STATES OF AMERICA,	)	
	)	
	)	
v.	)	CASE NO. CR-94-35-S
	)	
JESSE EDWIN RICHBURG,	)	
	)	

ORDER

On September 26 through October 2, 1995, defendant Jesse Richburg was tried under a five-count indictment for crimes relating to the murder of James Griffin in Geneva, Alabama. Count I of the indictment charged Richburg with conspiring to cause others to travel in interstate commerce with the intent to commit murder, in violation of 18 U.S.C.A. § 371; Count II charged Richburg with causing David Scott to travel in interstate commerce with the intent to commit murder, in violation of 18 U.S.C.A § 1958; Counts III and IV charged Richburg with causing David Scott and James Linder to travel in interstate commerce on two separate occasions with the intent to commit murder, also in violation of 18 U.S.C.A. § 1958; and Count V charged Richburg with aiding and abetting in the use of a firearm to commit murder for hire, in violation of 18 U.S.C.A. § § 1958, 924(c)(1), and 2. A jury acquitted Richburg of Count III and was unable to reach a verdict on any of the

other counts. The court declared a mistrial as to counts I, II, IV and V, and retrial was held on October 30 through November 2, 1995. Before retrial, Richburg filed a motion to dismiss the case because a second trial would constitute double jeopardy. The motion was denied. At retrial, the second jury convicted Richburg of all of the remaining counts.

The case is now before the court on Richburg's post-trial motion for judgement of acquittal. Richburg contends that under the rule of Ashe v. Swenson, 397 U.S. 436, 90 S. Ct. 1189 (1970), his second trial was collaterally estopped by the double jeopardy clause of the fifth amendment. The court disagrees.

I.

In Ashe, the Supreme Court struck down the conviction of a defendant who was charged with the robbery of six men who were playing poker together. Several burglars had entered the room where the men were playing poker and robbed them. The defendant was first tried for robbery of one of the players, and he was acquitted by a jury on a general verdict due to "insufficient evidence." Later, the defendant was tried for robbery of another of the six players and was convicted.

In striking down the conviction, the Supreme Court instructed courts that "Where a previous judgement of acquittal was based upon a general verdict...[the application of collateral estoppel] requires a court to 'examine the record of a prior

proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'" Ashe, 397 U.S. at 444, 90 S. Ct. at 1194. In Ashe, the Court found that "the single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers." 397 U.S. at 445, 90 S. Ct. at 1195. Because the first jury had necessarily concluded that the petitioner was not one of the burglars, his conviction from the second jury had to be overturned. Id.

In United States v. Brown, 983 F.2d 201, 202 (1993), the Eleventh Circuit Court of Appeals established a two-part test to determine whether a defendant's second trial after acquittal on some counts violates double jeopardy. First, a court must determine whether the jury's verdict of acquittal was based upon reasonable doubt about a single element of the crime which the court can identify. If so, the court must then decide whether that element is also an essential element of the crime for which the defendant was convicted in the second trial. The burden of persuasion is on the defendant on both inquiries. Brown, 983 F.2d at 202.

Richburg contends that because the record reveals no disputed issue as to whether either the murder or the three trips to Alabama actually occurred, but only as to his involvement with those events, the first jury necessarily concluded that

Richburg was not "involved" with any of the trips or the murder. However, upon careful review of the testimony, jury charge, and attorneys' statements in the first trial, the court determines that the acquittal on Count III necessarily concluded a much narrower factual issue: that Richburg did not knowingly "cause" Linder and Scott to take the second trip.[1] Based on the evidence presented at the first trial, the court finds that a rational jury must have believed that James Linder and David Scott took a trip to Alabama in or around the third week of June 1993. The acquittal indicates that the jury doubted that the trip was initiated by Richburg.

The evidence presented in the first trial supports several theories that might lead to acquittal on Count III alone. The jury may have believed that the Count III trip was not specifically authorized by Richburg, but that it was merely an extension of the first trip and did not constitute a separate crime. There is no evidence that there was any contact between Scott and Richburg between the first and second trips. Before the third trip, however, Richburg spoke to Scott and gave him the gun with which he killed Griffin.

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[1]The government suggests another justification for the jury's acquittal on Count III, but the court finds it unpersuasive. The government contends that the seven- to ten-day discrepancy between the dates of the Count III offense stated in the indictment and the evidence presented at trial led them to acquit on Count III. However, since the fact of the second trip was not placed in dispute by either the government or the defense, it was corroborated by at least three witnesses, and the jury charge explicitly counseled the jury that the government did not have to prove the exact date of the offense, the court finds that this rationale for the jury's acquittal is a very weak one.

The first jury may also have believed that Count III required that Richburg caused both Scott and Linder to take the second trip; and that Richburg had not, in fact, caused Linder to go. Linder testified that when he embarked on the Count III trip, he thought he was going to do a construction job. He did not know the purpose of the trip until it was underway. This testimony was corroborated by witness James Fletcher. There was no evidence linking Richburg to Linder before the Count III trip.

Lastly, the first jury may have thought that there was simply not enough evidence to link Richburg to the Count III trip--this point was presented by the defense in its closing argument, and the jury's communication to the court indicated that the acquittal was based on a lack of evidence in Count III.

Because there are numerous theories with a basis in the trial record that would support the first jury's acquittal on Count III and conviction on the other counts, this is not a case "where a fact or issue necessarily determined in the defendant's favor in the former trial is an essential element of conviction at the second trial." Brown, 983 F.2d at 202. The "single rational basis upon which the first jury verdict ...necessarily rested"--that is, Richburg's "causing" Linder and Scott to take the Count III trip--is not a necessary element of the crimes for which Richburg was eventually convicted, see id. Richburg could have been guilty of the conspiracy and the other substantive counts even if he had nothing to do with the trip to Alabama taken by Linder

and Scott in the third week of June 1993. Collateral estoppel does not apply.

II.

Lastly, Richburg contends that evidence relating to the act charged in Count III should have been excluded in the second trial. Richburg invokes United States v. Corley, 824 F.2d 931 (11th Cir. 1987), although it is unclear exactly how it supports his proposition. In Corley, the government was permitted to retry a defendant for conspiracy after she was acquitted by another jury on the only substantive count. On the defendant's motion, evidence relating to the substantive count was barred in the second trial by collateral estoppel. Id. at 935.

The court rejects Richburg's contention for two reasons. First, unlike the defendant in Corley, Richburg did not move to exclude evidence of the substantive counts at the second trial, and his current motion to exclude evidence is untimely. Moreover, Corley may be called into question by Dowling v. United States, 493 U.S. 342, 110 S. Ct. 668 (1990), which holds that collateral estoppel does not "exclude in all circumstances ...relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted." Id. at 348, 110 S. Ct. at 672. In this case, as in Dowling, the conduct in the acquitted offense was relied upon in the second prosecution not because it was an essential common factual

issue in both prosecutions, but because the conduct might prove by circumstantial evidence the existence of a different factual element essential to the second prosecution. For example, evidence that Linder and Scott traveled to Alabama to kill Griffin in the third week of June 1993 might tend to prove that they made a later trip, too. The court need not attempt to reconcile Dowling and Corley in any event, since Corley was not properly raised before evidence relating to the acquitted trip was admitted in the second trial.

For the reasons stated above, it is ORDERED that defendant Jesse Edwin Richburg's motion for judgement of acquittal, filed on November 9, 1995, is denied.

DONE, this the 19th day of March, 1995.

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UNITED STATES DISTRICT JUDGE